No. 11,364

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LIEUTENANT COLONEL ERNEST H. GOULD, United States Marine Corps, Commanding Officer of the United States Naval Disciplinary Barracks, Camp Shoemaker, California,

Appellant,

vs.

EDWARD A. DRAINER,

Appellee.

REPLY BRIEF OF APPELLEE

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STATEMENT OF FACTS.

On November 28, 1945, Edward A. Drainer was charged by Rear Admiral C. H. Wright, U. S. N., Commandant 12th Naval District, and Commander

Naval Operating Base with desertion in the following words, "In that Edward A. Drainer, private, U. S. Marine Corps, while so serving at the Recruit Depot, U. S. Marine Corps Base, San Diego, did on or about 8 September, 1940, desert from said depot and from the U. S. NAVAL SERVICE and did remain a deserter until he was delivered at the U. S. Marine Barracks, Treasure Island Activities, San Francisco, on or about 11 November, 1945". On the above quoted specification Edward A. Drainer was tried by a U. S. Naval General Court Martial on Treasure Island, San Francisco on January 5, 1946, and found guilty of desertion from the U. S. Naval Service.

The Court Martial in making its findings and decision struck out the following words from the specification, "He was delivered at the U. S. Marine Barracks, Treasure Island Activities, San Francisco, California, on or about 11 November, 1945," and substituted the following words, "on or about 27 July, 1943, when he was accepted for enlistment in the U. S. Naval Service".

Edward A. Drainer was sentenced to 18 months confinement at the conclusion of which he was to receive a dishonorable discharge from the U. S. Naval Service. Appellee thereupon was transferred to Camp Shoemaker, California, into the custody of the Appellant. Appellee then petitioned the Court below for a Writ of Habeas Corpus on the grounds that

the Naval Authorities and the Naval Court had no jurisdiction over petitioner in view of the fact that he had been separated from the U. S. Naval Service by an Honorable Medical Discharge which became effective on about November 1, 1944, or more than a year previous to the arrest charge and trial for desertion herein referred to. Petitioner further contended that the Statute of Limitations for the charge of desertion had already run before his apprehension.

The District Court of the United States, Northern District of California, Southern Division, Honorable Michael J. Roche presiding, heard the petition and on the 16th day of April, 1946, granted the Writ and ordered petitioner to be Discharged. From this order Appellant, Lt. Col. Ernest H. Gould, U. S. Marine Corps Commanding Officer of the U. S. Disciplinary Barracks, Camp Shoemaker, California, takes this appeal.

The facts in this case are substantially undisputed and reveal the following: On August 8, 1940, Edward A. Drainer, then 18 years of age, enlisted in the U. S. Marine Corps at Des Moines, Iowa for a period of four years. On September 8, 1940, he absented himself from the Marine Corps at San Diego, California, after serving one month in boot camp.

On July 27, 1943, petitioner, now being 21 years of age and our country being at war, became anxious to return to service in the defense of his country. He

voluntarily enlisted in the U. S. Navy at Clarksberg, West Virginia, his home state. In so enlisting, he gave his true name and address but gave his age as 17 in order to avoid the problem of not having a draft registration card, and failed to disclose his prior military service, one month in boot camp.

On November 1, 1944, after almost a year and a half of honorable service with the U. S. Navy, Aviation Branch, 8 months of which was spent overseas in the South Pacific Area, Edward A. Drainer was given an honorable medical discharge from the U. S. Naval Service, with a 4.0 rating in conduct and a 3.75 in proficiency.

On November 7, 1945, petitioner, now a married man and regularly employed in Arcata, California, was apprehended by civilian authorities, returned to Treasure Island, tried and found guilty of desertion from the U. S. NAVAL SERVICE from September 8, 1940, to July 27, 1943, and sentenced as already stated herein. It might be well to mention at this time that the original specifications charging Appellee with desertion from the U. S. Naval Service were amended by the General Court Martial Board to terminate the desertion on July 27, 1943, the date of Appellee's enlistment in the U. S. Naval Service. Obviously this amendment was made for the Court could not find Drainer deserting and serving the U. S. NAVAL SERVICE at the same time.

Counsel for Appellant remains persistent that the arrest of the Appellee in Cedar Rapids, Iowa, for theft and the serving of a 24 months sentence in a reformatory be brought before the Court. Appellee submits that this incident is irrelevant to the issues in this case however we feel compelled to submit the following facts and circumstances in reply.

When Edward A. Drainer left San Diego September 8, 1940, he was homesick and wanted to return to his home for a few days in West Virginia. He got as far as Cedar Rapids, Iowa, by riding freight trains. Having not eaten for a couple of days, having no funds and being too proud to beg, he and his companion broke the window of a grocery store and took less than a $1.00's worth of food whereupon he was arrested, charged with breaking and entering and sentenced to the reformatory from which he was released after serving 24 months. At no time in the proceeding was he offered the opportunity or assistance of counsel and further, the fact that he told the authorities that he was in the Marine Corps seemed of no concern to the magistrate. The magistrate did not report his identity to the Marine Corps. Obviously Drainer did not intend to desert in the true sense of the word but only desired to visit home for a few days and then return. The interruption of the Cedar Rapids incident and the failure of the magistrate to give concern to the fact that he was in the Marines, extended the few days intended visit to home to such a long period of time that Mr.

Drainer never did return because of his fear of the consequences, his lack of knowledge of the seriousness of desertion and the lack of confidence that his commanding officer would accept his explanation of events. In other words an absence without leave was thereby turned into a desertion.

CONTENTIONS OF APPELLEE.

1. That the Honorable Michael J. Roche, U. S. District Judge for the Northern District of California properly granted the Writ of Habeas Corpus and ordered the petitioner to be discharged from the custody of Appellant.

2. That the Honorable Michael J. Roche, U. S. District Judge for the Northern District of California properly held that the U. S. Naval Authorities and the Naval Court had NO JURISDICTION over the person of the Appellee in that the Appellee at the time of his arrest, charge and trial by the U. S. Naval General Court Martial was a civilian regularly separated from the service by an Honorable Discharge and therefore was no longer amenable to naval jurisdiction for a desertion committed prior to his receipt of such Honorable Discharge.

3. That the question of fraudulent enlistment is not an issue and is not relevant to the case before

this Court inasmuch as Edward A. Drainer was charged and tried for desertion and not for fraudulent enlistment.

QUESTION PRESENTED.

Can a civilian regularly separated from the service be tried by Court Martial for a desertion committed PRIOR to his receipt of an honorable discharge?

ARGUMENT.

Edward A. Drainer having been honorably discharged from the U. S. Naval Service on November 1, 1944, thereby became a CIVILIAN and was no longer amenable to naval military jurisdiction.

1. It is a general rule that a person is amenable to the military jurisdiction ONLY during the period of his service, thus the acceptance of a discharge or mustering out terminates this jurisdiction.

U. S. v. McDonald, 265 Fed. 695.

Ex parte Wilson (1929) 33 Fed. (2) 214.

U. S. v. McIntyre, 4 Fed. (2) 823.

U. S. v. Warden or Keeper of Naval Prison in Navy Yard, Brooklyn, N. Y., 265 Fed. 787.

Naval Courts and Boards, Section 334, page 92.

Winthrops Military Law and Precedence, 2nd Ed. (1920) at page 89.

(a) " . . . it has been uniformly and consistently held by the administrative officers of the Army and Navy that a person separated from either service thereafter ceases to be amenable to military jurisdiction and this practice has been approved by separate opinions of five Attorneys General. (citing opinions). These opinions are largely based on the recognition that a Court Martial under the laws of the U. S. is a court of special and limited jurisdiction. It has no jurisdiction beyond that given it by statute, and since there is no statute giving it jurisdiction over persons not in the military service it may not assume such jurisdiction either as a matter of convenience or public policy."

Ex Parte Wilson. (Supra).

(b) A member of the U. S. Naval Reserve is no longer subject to military law after release from active duty.

U. S. v. Warden. (Supra).

U. S. v. McDonald. (Supra).

2. Edward A. Drainer having been HONORABLY DISCHARGED from the U. S. NAVAL SERVICE on November 1, 1944, the U. S. NAVAL SERVICE is thereby barred from going behind this discharge and charging Appellee with a desertion prior to the date of said Honorable Discharge.

(a) Where a soldier deserted, was restored to duty, subsequently given an honorable discharge and thereafter charged by a Court Martial Board for the desertion, the Chief Justice of the U. S. Supreme Court delivered the opinion and affirmed the lower court. From this opinion we quote "The Honorable Discharge of the deserted was a formal, final judgment passed by the government UPON THE ENTIRE MILITARY RECORD OF THE SOLDIER AND AN AUTHORITATIVE DECLARATION BY IT THAT HE HAD LEFT THE SERVICE IN A STATUS OF HONOR . . . ."

U. S. v. Kelly, 82 U. S. 36.

(b) In 1875 the U. S. Supreme Court reiterated the law of the Kelly case and cited it in this manner: "The plain and definite language of the Kelly case established that honorable discharge is a formal, final judg-

ment of the soldier upon his entire military record. THIS DISCHARGE CANNOT BE IMPEACHED COLLATERALLY . . . ."

U. S. v. Landers (1875) 92 U. S. 78.

(c) The Kelly case is again cited with approval in Nordman v. Woodring, Okl. (1938) 28 Fed. (2) 573; Davis v. Woodring (1940) 111 Fed. (2) 523; Parker v. Anders, Vt., (1942) 25 Atl. 41.

(d) The language of the Kelly case was cited favorably in J. A. G. opinion (1918) vol. 2 at page 838: "Mustering out is a formal discharge from the Army making the soldier a civilian and terminating all military authority and jurisdiction over him. In effect an honorable discharge is the judgment of the government upon the entire military record of the soldier and a declaration that he left the service in a state of honor and therefore cannot be tried for a former charge of desertion."

3. The Marine Corps is not a separate branch of the service but is a part of the U. S. Naval Service and is subject to the laws and regulations of the U. S. Navy.

(a) The leading U. S. Supreme Court case on this point and which has been currently cited over and over again is:

U. S. v. Dunn, 120 U. S. 249.

In this case the court considered the status of the Marine Corps and held that it was a part of the Naval Service and that service by an officer of the Navy as an enlisted man in the Marine Corps was to be credited to him in calculating logevity pay.

(b) "The Marine Corps shall at all times be subject to the laws and regulations established for the government of the Navy."

U. S. Code Title 34, Section 715.

(c) U. S. Navy regulations 1920 (reprinted 1941) section 552, sub. (2). "The Marine Corps shall at all times be subject to the laws and regulations of the Navy."

(d) Naval Courts and Boards, section 333 at page 191: "The classes of persons in the Naval Service and subject to the Naval jurisdiction of the U. S. includes all members of the:

1. Regular Navy Active and Retired, Midshipmen, and the Navy Nurse Corps.
2. Officers and men of the Naval Reserve and the Marine Corps Reserve when employed on active duty.
3. The Mairne Corps when not detached from duty by order of the President."

(e) "The Marine Corps is part of the Navy and subject to the rules and regulations of the Navy.

Muse v. U. S., 19 Ct. Cls. 441.

(f) In U. S. v. Waller (1925) 225 Fed. 673., a Marine on detached service with the Army by Order of the President deserted. He was tried and convicted by a Naval Court Martial. The Court held the Naval Court had no jurisdiction on the grounds that this Marine was on detached Army service on order of the President. The Court did however say: "Granted that the status of the Marine Corps was at first doubtful. It rendered service at times with the Navy and at times with the Army without being definitely or permanently attached to either department. Its primary relation was finally settled to be with the Navy but it had special and temporary relations when on service with the Army. The early statutes gave recognition to this by providing that it should be subject to the laws and regulations of the Navy except when detached by order of the President for service with the Army. . . ."

(g) In re Byrne (Wash. D. C.) 1928, 26 Fed. 2nd 750. "Upon further and a careful examination I am unable to find any substan-

tial reason for concluding that there is any difference between a seaman and a Mairne."

(h) In re Doyle (N. Y.) 1883, 18 Fed. 369: "I am satisfied that it (Marine Corps) is properly classed with and is a part of the Naval Service of the United States. The question was discussed and so determined by Attorney General Wm. Wirt, 1820, and this opinion has been repeatedly followed . . .". "In various acts of Congress making appropriations the Marines are frequently referred to as a part of the Naval Service and are sometimes described as Marines of the U. S. Navy." In this same decision the Court said "Thus paid, thus serving, and thus governed like and with the Navy it is certainly no forced construction to consider them embraced in the spirit of the act of 1837 by the description of persons enlisted for the Navy." The decision further reasons that in the Code of Laws of the U. S. the Marine Corps is provided for in chapter one of title 34 which is entitled "NAVY" while the ARMY is the subject of Title 10. These considerations together with the express provisions of section 715 above quoted that the Marine Corps shall at all times be subject to the laws and regulations of the Navy except when detached for service with the Army by order of the President seems to

be conclusive that the Marine Corps is a branch of the Naval Service.

(i) In Love v. State Election Board, Okl., Supreme Ct. (1946) 170 Pac. 2nd 192, we find the following: "The Army and Navy constitute the military forces of the government and for this purpose they are under the authority of one Commanding Chief but over each a Secertary is appointed to manage and administer its affairs." The case then goes on to define what the Army consists of and what the Navy consists of and the Marine Corps is described as a part of the Navy and subject to the laws and regulations for the government of the Navy.

(j) In the current issue of WORDS AND PHRASES, Vol. 26 under the definition of "MARINE CORPS" we find the following:

"The Marine Corps of the U. S. is a military body designed to perform services and while they are not necessarily performed on board ship their act of service in time of war is chiefly in the Navy and accompanying or aiding Naval expeditions. In time of peace they are located in Navy Yards mainly, though occasionally they may be used in ports and arsenals belonging more immediately to the Army. They may be ordered to service in either

branch. They are a military body primarily belonging to the Navy and under the control of the head of the Navy Department. . . ." Citing U. S. v. Dunn (Supra).

(k) In U. S. Statutes at Large, Vol. 1, at page 594 which is the congressional act establishing and organizing the Marine Corps it is provided that the Marine Corps shall be governed by the rules and regulations of the Navy. Although the act does not clearly indicate the status of the Marine Corps in the military organization the obvious implication is that it is not created to be an independent military organization but rather to be a part of the U. S. Naval Service.

Appellee has thoroughly searched the court decisions congressional and statutory records and has been unable to find even one authoritative indication that the Marines are a separate and independent military organization. In view of both the statutory and case law, Appellee submits that only one conclusion can be drawn and that is that the Marine Corps is NOT an independent military organization but that it is a part of the U. S. Navy and made subject to the laws and regulations of the U. S. Navy, with the Secretary of the Navy as the titular head of the U. S. Naval Service.

Appellee calls the Court's attention to the fact that *Edward A. Drainer was not charged with de-*

sertion from the Marine Corps. He was charged with desertion from the U. S. Naval Service. In the original specification Appellee was charged with deserting the naval service from September 8, 1940 until November 11, 1945, however the Naval Court Martial Board amended the original specifications to strike out the period from July 27, 1943, for at this time Appellee re-enlisted in the U. S. Naval Service and therefore could not have been *serving* and *deserting* the *same service* at the same time. Appellee was honorably discharged from the U. S. Naval Service on November 1, 1944.

If Appellant's contention that the Marine Corps is a separate branch of the service is correct then the U. S. Naval Court Martial Board had no jurisdiction to try Appellee on a charge of desertion from the U. S. Naval Service. If Appellant's contention is not correct prosecution for desertion from the U. S. Naval Service after Appellee had received an Honorable Discharge from the U. S. Naval Service is barred by such Honorable Discharge.

4. Appellant has given much time in his brief to the question of fraudulent enlistment. Suffice is it to say that the original charge made by the naval authorities to the Court Martial Board and the decision of the Board was for desertion and NOT fraudulent enlistment. Appellee submits that "fraudulent enlistment" was not properly an issue before the U. S. District Court nor is it a proper issue before

this Court. Appellant's failure to make this an issue before the Naval Court bars him from asking this Court to consider it. (U. S. v. Landers, Supra). Appellee respectfully asserts this contention should not prejudice his cause, nor cloud the true issues.

CONCLUSION.

Edward A. Drainer, who had only six years of schooling, admittedly did a foolish thing when he was 18; however, upon reaching manhood, with his Country at war, when his country's need was the greatest, when men were being drafted to fight, Appellee voluntarily enlisted for service, volunteered for the aviation branch of the Navy and requested duty overseas. He served his country when he was most needed and when danger was the greatest.

Appellee has suffered and has already paid a dear price for an intended absence without leave which was turned into a desertion by a peculiar chain of circumstances beyond his control.

Justice requires that he be made to suffer no more, that his freedom be made permanent, that he be allowed to remain at home supporting his wife and his bed-ridden mother, whose days on this earth are numbered, and that he be allowed to walk proudly as "one who served his country when his country needed men who were willing to fight and die".

Edward A. Drainer served his country, he didn't desert it. The U. S. Naval Service honorably discharged him. We urge that this Court do likewise by affirming the decision of the learned Court below.

Dated: November 14, 1946. Oakland, California.

Respectfully submitted,

WOODROW W. KITCHEL,

Attorney for Appellee.